Brief of A. McKinley for D. C.

IN

THE SUPREME COURT

OF THE

Filed Feb. 21, 1899

UNITED STATES.

OCTOBER TERM, 1898.

THE AMERICAN REFRIGERATOR TRANSIT COMPANY,
Plaintiff in Error,

vs.

FRANK HALE, TREASURER OF ARAPAHOE COUNTY, COLORADO,
Defendant in Error.

No. 226.

In Error to the Supreme Court of Colorado.

STATEMENT AND BRIEF FOR DEFENDANT IN ERROR.

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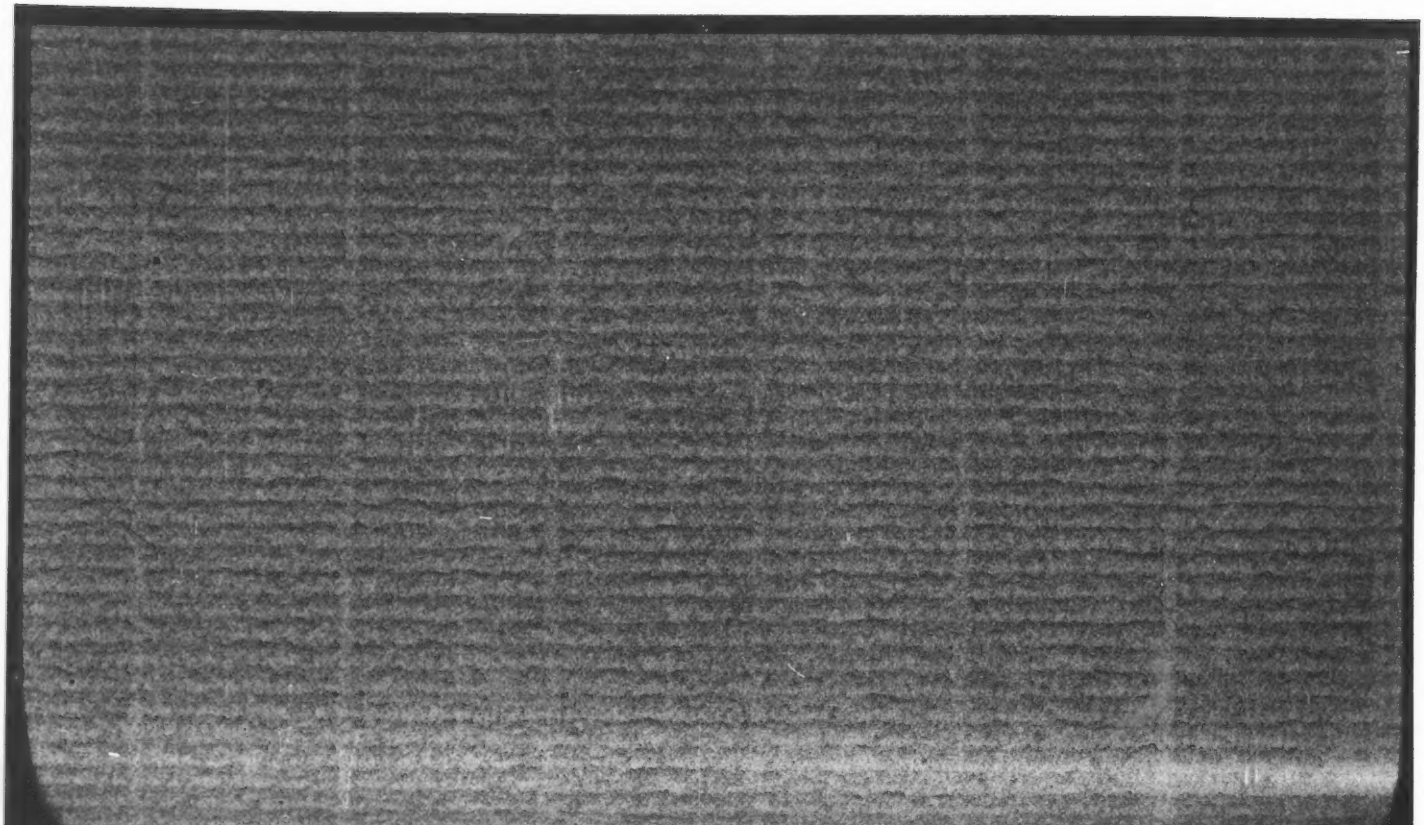
Attorney for Defendant in Error.



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STATEMENT.

In the Supreme Court of the State of Colorado, on the hearing of this case, three questions of law were involved:—

First.—Whether the cars of the Transit Company, being only transiently present within the State of Colorado from time to time, acquired no such

situs within said state, as is necessary to give the state jurisdiction over them for the purposes of taxation.

Second.—Whether such taxation amounts to a regulation of interstate commerce, and thereby is repugnant to the exclusive power of Congress to regulate such commerce.

Third.—If said property is taxable within this state, whether there is adequate state legislation to assess and tax the same.

Each of these questions was fully considered by the Supreme Court of Colorado, and each decided in favor of this defendant in error.

As to the third question, the State Supreme Court having passed upon the validity and sufficiency of the local statutes, this Court will follow its decision in that respect, thereby eliminating that question and leaving the other two questions to be considered in this Court.

Counsel for plaintiff in error, in their specifications of error, on page 4 of their brief, practically recognize these two questions as the only ones before this Court. They also recognize, as we do, that these two points of *situs* and of the interstate commerce matter, are somewhat mingled and involved one with the other; the language of their brief (p. 3) being as follows:

> "The sole question of law raised was as to the jurisdiction of the state to tax the cars of plaintiff in error so used as agreed, plaintiff in error insisting that the cars having no *situs* within the state, their taxation by the state authorities would amount to a regulation of in-

terstate commerce, and thus be repugnant to the exclusive power vested in Congress to regulate such commerce."

POINTS.

1. The tax now under consideration is not a license tax, or in any sense a tax for the privilege of transacting interstate commerce, but only a property tax imposed upon certain cars employed in such commerce.

Adams Express Co. vs. Ohio (rehearing), 166 U. S., 185.
Ibid (original), 165 U. S., 194.
Adams Express Co. vs. Ind., 165 U. S., 255.
Postal Telegraph Cable Co. vs. Adams, 155 U. S., 688.
Adams Express Co. vs. Ky., 166 U. S., 171.
Pullman Palace Car Co. vs. Pa., 141 U.S., 18.
Marye vs. B. & O. Ry. Co., 127 U. S., 117.
Also, authorities cited in foregoing cases.

2. The fact that cars or other vehicles are employed in interstate commerce does not in the least abridge the right of a state to tax them; their being so employed does not exempt them from taxation by the state, and the state does not tax them because of their being so employed, but because of their being within its territory and jurisdiction.

Adams Express Co. vs. Ohio, rehearing, 166 U. S., 185; s. c. (original) 165 U. S., 194.
Pullman Palace Car Co. vs. Pa., 141 U. S., 18.

3. The fact that the same cars are not continuously in use in Colorado, but are changing, does not prevent assessment and taxation. In such case the tax may be fixed by a valuation of the average amount of the property thus habitually used in the state.

Pullman Palace Car Co. vs. Pa., *supra*.
Marye vs. B. & O. R'y., *supra*.

4. The right of the state to tax all subjects within its jurisdiction is unquestionable, and this right may in the discretion of the Legislature be exercised over all property coming temporarily within its territory, whether for trade, business or convenience, unless such exercise conflicts with some constitutional limitation.

Pullman Palace Car Co., *supra*.
R. R Co. vs. Penniston, 18 Wall., 5.
Lane vs. Oregon, 7 Wall., 71.
25 Am. & Eng. Ency. Law, p. 18.

5. For the purposes of taxation, personal property may be separated from its owner, and he may be taxed on its account at the place where it is, although not the place of his domicil, and even if he is not a citizen or resident of the state which imposes the tax.

Pullman Palace Car Co. vs. Pa., *supra*, and authorities therein cited.

6. The courts of the United States adopt and follow the decisions of the highest court of a state in questions which concern merely the constitution or laws of that state.

Bucher vs. Cheshire R. R. Co., 125 U. S., 555.

Long Island Water Supply Co. vs. Brooklyn, 166 U. S., 685.

M. & M. Bank vs. Pa., 167 U. S., 461.

Adams Express Co. vs. Ohio, 165 U. S., on page 219.

ARGUMENT.

In this case, in lieu of evidence, there was an agreed statement of facts, which is set out in full in the printed transcript of record in this Court, on pages 10, 11 and 12; again on pages 14, 15 and 16; and again on pages 20 and 21.

The second clause of that stipulation is as follows:

> "2nd. That the average number of cars of the plaintiff used in the course of the business aforesaid within the State of Colorado during the year, for which such assessment was made, would equal forty, and that the cash value of plaintiff's cars exceeds the sum of $250 per car, and that if such property of the plaintiff is assessable and taxable within such State of Colorado, then the amount for which such cars, the property of the plaintiff, is assessed by said State Board of Equalization, is just and reasonable and not in excess of the value placed upon other like property within said state for the purpose of taxation."

This stipulation has an important bearing in determining the question of *situs* of this particular property when considered in the light of the authorities cited. It, in fact, brings the property directly within the reasoning of the Pullman Palace Car case *supra*, and other authorities hereafter quoted.

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This was the view taken by the Supreme Court of Colorado.

See—

> Opinion Supreme Court in this case, set out in full, pp. 22-26, inclusive, of the printed transcript of record herein.

The fact is admitted in the stipulation taken in connection with the pleadings, that the cars of the plaintiff in error were used on the railroad lines in the State of Colorado, and to the extent of such use took the place of other equipment of such railroads that would have been necessary for a particular class of freight, to-wit, perishable goods.

If it had been left to proof under the pleadings as to the use of such cars, it could have been made to appear that certain cars traveled exact distances on certain days throughout the tax year. The records of plaintiff in error and of railroad companies would necessarily show this, as it appears by the pleadings that these Colorado railroads pay the plaintiff in error for the exact number of miles hauled, three-fourths of a cent a mile. Aggregating the total mileage and the total number of days in a year, it would have been susceptible of proof as to the average number of cars in use throughout the year. For this proof was substituted the stipulation that the average number of cars so used within the State of Colorado "during the year for which assessment was made, would equal forty."

I can see no force in the learned counsels' distinction between the use of the word "during" used in the stipulation, and the word "throughout"

used in some of the decisions. For, taken in connection with the pleadings, the stipulation can mean nothing else than that to transact the business which plaintiff in error is transacting in Colorado, it requires the use of forty of its cars, not for one day nor for ten days, but on an average for each day during and throughout the whole tax year. The cars may at times be on side tracks, or elsewhere, but considering all the business of the plaintiff in error done within the boundaries of Colorado for the given year, it would have required, or did require, the entire use of forty cars. It is, of course, admitted under the decisions, that the presence of any one car, throughout the entire year, is immaterial, if there was habitually the average number in use.

It being ascertained that that number of cars was within the State of Colorado during the tax year, the assessment and taxation of them by the state authorities was only the attempt to subject property within the state to taxation the same as property always and wholly within the state. It was no attempt to regulate or attach a condition by way of license or assessment on the the privilege or permission to plaintiff in error to transact business, or to carry on commerce. That privilege or right was wholly unaffected. It would seem, at least, that to sustain even a shadow of complaint on this ground, the plaintiff in error should have attempted to show that these cars were its property in another state, and were there assessed and taxed. Plaintiff in error has made no showing of this kind.

On this head, I quote from the argument of

Mr. Twitchell for the Treasurer in the Supreme Court of Colorado:

> "There is a difference between the cars of this character, and those furnished by another railroad. In the case of cars owned by another railroad company, such companies are required to return and list the same for taxation as a part of the rolling stock of their own road, in whatsoever state they may be operating, and all such rolling stock is taxed, either in this or some other state, and the railroad corporations of this state, using the cars of another railroad company, are simply so using them in place of cars of their own, that are being run over some other railroad. The railroad companies operating in this state return their rolling stock here for taxation, whether it is actually in the state or not; and so it is with railroads operating in other states—they return their rolling stock for taxation there, notwithstanding the fact that some of the Colorado corporations may, upon the particular day fixed for assessments, be using a portion of their rolling stock. In this way all such property contributes a just share of taxes.
>
> "With a company like the plaintiff, however, it is entirely different. It is an Illinois corporation, having its principal office in that state. It is only required, under the laws of Illinois, to return for taxation, such property as it has within that state upon the 1st day of May. If, therefore, its cars are not taxable in the other states where it is doing business, and has its property upon the date of taxation, then the result is that it escapes taxation. If such doctrine is to be upheld, then the different railroad companies will finally organize sub-companies to own their rolling stock, and in that way largely avoid taxation upon their property.
>
> "It is true that nothing is said in the complaint, or statement of facts, as to whether this

> property is or is not taxed in the State of Illinois. But if it is taxed, it is incumbent upon the plaintiff to plead and prove such facts, and plaintiff not having done so, we must necessarily presume that it is not taxed in that state."

And in this connection, the language of this Court on the rehearing of *Adams Express Company vs. Ohio*, 166 U. S., 225, is apropos:

> "In conclusion let us say that this is eminently a practical age; that courts must recognize things as they are, and as possessing a value which is accorded to them in the markets of the world, and that no fine spun theories about *situs* should interfere to enable these large corporations, whose business is carried on through many States, to escape from bearing in each state such burden of taxation as a fair distribution of the actual value of their property among those states requires."

Property of the plaintiff in error, of a large value, as admitted in the stipulation, is within the State of Colorado. Although the particular cars change, the average total number is here during the year. It is, so to speak, to that extent segregated from like property of the company in other states. To that extent, at least, it receives the benefit and protection of the laws of Colorado, its officers and courts, and its owners should, though domiciled elsewhere, pay a just proportion of the taxes required to maintain the government of the state where that part of its property is so located and protected.

It is evident that the constitution of the state contemplated such taxation:

> "All corporations in this state, *or doing busi-*

> *ness therein*, shall be subject to taxation for state, county, school, municipal, and other purposes, on the real and personal property *owned or used by them* within the territorial limits of the authority levying the tax."
>
> Sec. 10, Art. 10, Colorado Constitution.

Under somewhat similar provisions of the constitution of Utah, the Supreme Court of that state recently discussed the subject of taxation, and, among other things, said:

> "Courts, whose decisions are entitled to great weight, have sustained the apportionment of property used by railroad, telegraph, and sleeping-car companies, in different states, or lesser taxing jurisdiction, on the mileage basis. In view of all the difficulties, conditions and elements taken into consideration in those cases, such a basis is accepted as just and practical for ascertaining the property used, or the business carried on and taxed for the benefit of each state, or other jurisdiction."

Again:

> "The use meant is not a temporary use of personal property in such county when its owner resides elsewhere. It means the continuous use of its property by a corporation, or other person, in the county, or other taxing district."
>
> Salt Lake County vs. State Board of Equalization (Dec. 3, 1898), Vol. 55, No. 5, dated Jan. 12, 1899, p. 378, Pac. Rep.

The basis of valuation in this case is not even dependent on apportionment, but considers alone the average number of cars, and the admitted value thereof, within the State of Colorado during the tax year in question.

In the original opinion of this Court, in *Adams Express Company vs. Ohio*, 165 U. S., on page 225 (s. c., *Sanford vs. Poe*, 17 Sup. Ct. Rep., 305), this Court quotes with approval the following language of the Court of Appeals in the same case:

> "Similar views were expressed by the Circuit Court of Appeals, *Sanford vs. Poe*, 37 U. S. App., 378, 395. Judge Lurton delivering the opinion, saying:
>
> "'The tax imposed is not a license tax, nor a tax on the business or occupation, nor on the transportation of property through the state, nor from points within the state to points in other states, nor from points in other states to points within the state. It purports to provide for a tax upon property within the state of Ohio. Though this property is employed very largely in the business of interstate commerce, yet that does not exempt it from the same liability to taxation as all other property within the jurisdiction of Ohio. This proposition is too well settled to need argument.'"

In the same case, on page 220, this Court uses this language:

> "Although the transportation of the subjects of interstate commerce, or the receipts received therefrom, or the occupation or business of carrying it on, cannot be directly subjected to state taxation, yet property belonging to corporations or companies engaged in such commerce may be; and whatever the particular form of the exaction, if it is essentially only property taxation, it will not be considered as falling within the inhibition of the Constitution. Corporations and companies engaged in interstate commerce should bear their proper proportion of the burdens of the governments under whose protection they conduct their operations, and taxation on property, collectable by the ordinary means, does not affect

interstate commerce otherwise than incidentally, as all business is affected by the necessity of contributing to the support of government. *Postal Telegraph Cable Co. vs. Adams*, 155 U. S., 688."

And on page 227, this language is used:

"In *Pullman's Palace Car Co. vs. Pennsylvania*, the rule is considered that personal property may be separated from its owner and he may be taxed, on its account, at the place where it is, although not the place of his own domicile, and even if he is not a citizen or resident of the state which imposes the tax; and the distinction between ships and vessels and other personal property is pointed out. The authorities are largely examined and need not be gone over again."

Even the dissenting opinion of this Court in this case argues in favor of our contention herein. The reasons for the dissent in that case were based on entirely different grounds than any which will support the contention of the plaintiff in error in this case. Without elaborating on this point, I quote from the dissenting opinion of Mr. Justice White, first on page 247. After remarking on the review of certain cases in *Postal Telegraph Cable Company vs. Adams*, 155 U. S., 688, Mr. Justice White says:

"And summing the whole up, the Court concluded (p. 700):

"'We are of opinion that it was within the power of the state to levy a charge upon this company in the form of a franchise tax, but arrived at with reference to the value of its property within the state and in lieu of all other taxes, and that the exercise of that power by this statute, as expounded by the highest judicial tribunal of the state in the language

we have quoted, did not amount to a regulation of interstate commerce or put an unconstitutional restraint thereon.'

"This construction of the previous cases decided by this Court elucidates and makes plain the fact that they proceeded upon and were intended to enforce the rule that the validity of a state tax would be determined by the substantial results of the burden imposed, and not by the mere form which it assumed, and although the form of the imposition might seem to bring the tax within the reach of the inhibition against levying a charge upon property beyond the jurisdiction of the state, or within the prohibitions of the constitution of the United States forbidding the laying of burdens on interstate commerce, this Court would not interfere therewith provided the exaction in substance amounted to no more than the sum of the taxation which the state might lawfully impose upon the property actually within its jurisdiction, and provided that in reality the burden laid by the state was not an interference with interstate commerce."

And again, on page 249, Mr. Justice White says:

"Before proceeding to discuss this proposition, however, I call attention to the fact that I intentionally refrain from placing a sleeping-car company in the same category with telegraph and railroad companies, because the decision in the case of *The Pullman's Car Co. vs. Pennsylvania*, 141 U. S., 18, was not founded upon the theory, nor did it purport to assert, that the property or plant of a sleeping-car company was a unit, and that of necessity a part of such property may be measured by a rule applicable to continuous lines of road. In that decision the Court merely emphasized the holding that the tax was one laid upon 100 cars of the company, possessing an actual *situs* in Pennsylvania. In the statement of the case

(p. 20), the decision of the Supreme Court of Pennsylvania was quoted verbatim, in which it was declared that the tax on the capital stock of the Pullman Company was in reality but a tax on its property; that the coaches of the company were such property, and that the fact that the coaches might also be operated in other states would simply reduce the value of the property in Pennsylvania justly subject to taxation there. This Court practically adopted the views so expressed by the state Court."

In the case of *Adams Express Company vs. Kentucky*, 166 U. S., p. 171, this Court reviewed a state tax on intangible property, which tax was claimed to be in contravention of the commerce clause. The Court sustained the tax, and among other things said, p. 180:

> "So far as the commerce clause and the fourteenth amendment of the federal constitution are concerned, this scheme of taxation is not in contravention thereof, as already determined in *Adams Express Company vs. Ohio State Auditor*, 165 U. S., 194, and cases cited.
>
> "And considered as a property tax, as in our opinion the prescribed exaction must be held to be, we regard it as in harmony with the provisions of the constitution of the commonwealth of Kentucky."

On rehearing of the case of *Adams Express Company vs. Ohio*, 166 U. S., p. 185, much is said both in the opinion of the Court, and even in the briefs and argument of the eminent counsel for the defeated parties, which recognizes the validity of the tax in the case at bar, and refutes the argument and points of the learned counsel in this case. In fact, this and the other opinions of this court, in this and other late cases quoted, seem clearly to

meet all the contentions of plaintiff in error, and to fully and completely overthrow them.

In their petition for re-argument, counsel for the express company say (p. 202):

> "16. The sleeping car case stands upon necessity, but of a very different sort from that of the railroad and telegraph cases. The difficulty was occasioned by the circumstance that the cars were constantly moving from state to state; they had a physical *situs* in one as much as in another; but the whole could not be said to have a *situs* in any one. Some method of ascertaining the number and value of the cars in Pennsylvania was necessary. The method adopted was assailed on the ground that capital stock was not taxable, This objection was not good, for capital stock was held not to be taxed, but the cars only. If the method had been attacked on the true grounds it would have been perceived that there was a better way. The method adopted was thought to be effectual to determine the average number and value of cars used in Pennsylvania, and this seems not to have been contested by the Pullman Company. The better way would have been that suggested by Mr. Justice Matthews in *Marye vs. Baltimore & Ohio Railroad*, 127 U. S.. 117, 123, cited and approved by the court in the *Pullman cases*, to-wit, to ascertain and appraise the average number of cars habitually used in the state."

On pages 212 and 213, reviewing *The Pullman Palace Car Company vs. Pennsylvania*, 141 U. S., counsel say:

> "Upon perusing the opinion in that case, it will be perceived that it begins by an emphatic statement and maintenance of the rule that property is not subject to taxation by a state unless it has an actual *situs* therein. It was

manifest that the sleeping cars had an actual *situs* outside of the place of domicile of the company owning them, and therefore that they were justly taxable outside of that state. The puzzle was that they had this actual *situs* as much in one of several other states as another. Each might put in a claim that a *situs* was within its own territory exclusively. Such exceptional cases of course justify a resort to exceptional methods. The real problem was to ascertain how much of this sleeping car property was fairly to be treated as having a *situs* in Pennsylvania. The actual method which was sanctioned was not subjected to discussion. What was insisted upon by the company was that *no* method was allowable. If the horses, wagons, etc., used by the express companies in Ohio had been, in point of fact, used in a similar manner in half a dozen different states, the decision in the sleeping car case would have justified the adoption of some equitable method of ascertaining to how many of them a *situs* in Ohio should be assigned. Upon the other point, as to whether taxing these sleeping cars was imposing a burden upon interstate commerce, there is nothing certainly opposed to our contention. We have never asserted, in the remotest degree, that the horses, wagons, harness, etc., of the express companies in Ohio are in any way relieved from taxation because employed in interstate commerce."

The Court itself says (p. 218):

"Again and again has this Court affirmed the proposition that no state can interfere with interstate commerce through the imposition of a tax, by whatever name called, which is in effect a tax for the privilege of transacting such commerce. And it has often affirmed that such restriction upon the power of a state to interfere with interstate commerce, does not in the least degree, abridge the right of a state to tax, at their full value.

all the instrumentalities used for such commerce."

The cases of *Pullman Palace Car Co. vs. Pennsylvania*, 141 U. S., and *Maryе vs. B. & O. Ry. Co.*, 127 U. S., more especially applied to the subject of taxation of tangible property such as in this case, and are particularly in point. The doctrines announced are followed, emphasized and elaborated in the later Express Company cases, but, owing to the subject matter of the taxation being so like that involved in this suit, I quote from these earlier cases also.

In the Pullman Palace Car case, on pages 25 and 26, it is said:

> "The cars of this company within the State of Pennsylvania are employed in interstate commerce; but their being so employed does not exempt them from taxation by the state; and the state has not taxed them because of their being so employed, but because of their being within its territory and jurisdiction. The cars were continuously and permanently employed in going to and fro upon certain routes of travel. If they had never passed beyond the limits of Pennsylvania, it could not be doubted that the state could tax them, like other property within its borders, notwithstanding they were employed in interstate commerce. The fact that, instead of stopping at the state boundary, they cross that boundary in going out and coming back, cannot affect the power of the state to levy a tax upon them. The state, having the right, for the purposes of taxation, to tax any personal property found within its jurisdiction, without regard to the place of the owner's domicile, could tax the specific cars which at a given moment were within its borders. The route over which the cars travel extending beyond the limits of the

state, particular cars may not remain within the state; but the company has at all times substantially the same number of cars within the state, and continuously and constantly uses there a portion of its property; and it is distinctly found, as matter of fact, that the company continuously, throughout the periods for which these taxes were levied, carried on business in Pennsylvania, and had about 100 cars within the state."

This case was followed in a Kansas case which seems to have involved like taxation:

"This was a bill in equity by Pullman Palace Car Company * * * to restrain the collection of a tax assessed in 1885 and 1886, by the board of railroad assessors of the State of Kansas, to the said railroad corporations, upon sleeping cars, dining-room cars, and parlor cars, owned by the plaintiff, and by it let to those corporations, and employed exclusively in interstate commerce; and apportioned among the counties aforesaid, according to the mileage of the railroads in each county; and levied accordingly in those counties."

P. P. Car Company vs. Hayward, 141 U. S., 37.

In the case of *Marye vs. B. & O. R. R.*, the tax involved was not sustained, but solely for the reason that the State of Virginia had not provided by statute for taxation on property of foreign railroad corporations within its jurisdiction, but it was held that the State had the power and authority so to do. This Court said:

"It is not denied, as it cannot be, that the State of Virginia has rightful power to levy and collect a tax upon such property used and

found within its territorial limits, as this property was used and found, if and whenever it may choose, by apt legislation, to exert its authority over the subject. It is quite true, as the *situs* of the Baltimore & Ohio Railroad Company is in the State of Maryland, that also, upon general principles, is the *situs* of all its personal property; but for purposes of taxation, as well as for other purposes, that *situs* may be fixed in whatever locality the property may be brought and used by its owner by the law of the place where it is found. If the Baltimore & Ohio Railroad Company is permitted by the State of Virginia to bring into its territory, and there habitually to use and employ, a portion of its movable personal property, and the railroad company chooses so to do, it would certainly be competent and legitimate for the state to impose upon such property, thus used and employed, its fair share of the burdens of taxation imposed upon similar property used in the like way by its own citizens. And such a tax might properly be assessed and collected in cases like the present, where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business. In such cases, the tax might be fixed by an appraisement and valuation of the average amount of the property thus habitually used, and collected by distraint upon any portion that might at any time be found. Of course, the lawlessness of a tax upon vehicles of transportation used by common carriers might have to be considered in particular instances, with reference to its operation as a regulation of commerce among the states, but the mere fact that they were employed as vehicles of transportation in the interchange of interstate commerce would not render their taxation invalid."

Marye vs. B. & O. R. R., 127 U. S., 123 and 124.

Counsel for plaintiff in error quote a number of authorities to the effect that vehicles and other property used in interstate commerce acquire no *situs* for taxation in other states than those of their domicile; but, I think an examination of all those cases will show that they arise over attempts to tax or license the privilege of doing business with such property in another state, and do not go to the extent of the right of the state to tax the property itself, as property, in the same manner, and to the same extent, as other property in such state; but, should any of them in any wise seem to hold a contrary doctrine than announced in 127, 141, 155, 165, and 166, United States reports, they are, of course, overthrown by these later and exhaustive decisions.

Two of the principal cases now cited by the learned counsel were also cited by them in the Supreme Court of the State of Colorado, and that court directly referred and distinguished such cases from this at bar, in the following language:

> "*Pickard vs. Pullman Southern Car Company*, 117 U. S., 34, and *Pullman Southern Car Company vs. Nolan*, 22 Fed. Reporter, 276, are mainly relied on as sustaining a contrary view. While the Court uses general expressions touching the question of *situs* that seem to sustain the contention of defendant in error, it is to be observed that the question then under consideration was the validity of a license, or privilege tax imposed upon cars employed in interstate commerce, and the language touching the *situs* of the property was used with reference to the right of a state to impose such

a tax, and not as to its jurisdiction to impose a property tax, as in the case under consideration."

"In *Pullman's Palace Car Company vs. Pa., supra*, Mr. Justice Gray, referring to these and kindred cases, says:

"'Much reliance is also placed by plaintiff in error upon the cases in which this Court has decided that citizens or corporations of one state cannot be taxed by another state for a license or privilege to carry on interstate or foreign commerce within its limits; but in each of those cases the tax was not upon the property employed in that business, but upon the right to carry on the business at all, and was, thereby held to impose a direct burden upon the commerce itself.'

"It will be readily seen, therefore, that the expressions of the Court in regard to the question of *situs* could have no significance or bearing upon that question as presented in this case. If it can be said that the Court, in those cases, intended to hold that under the conditions therein disclosed the cars acquired no *situs* that would subject them to a property tax, then its finding was in direct conflict with the conclusion reached in the later cases above referred to."

So it is throughout the books. A broad and clear distinction is made on the one hand, between a state enactment that in anywise attempts to regulate, or attach conditions to, the privilege of conducting commerce among and between the different states of the Federal Union, and, on the other hand, a state enactment which merely assumes to subject property within its jurisdiction—although belonging

to a company engaged in interstate commerce — to equable taxation, *i. e.*, a rate and valuation not excessive when compared with taxation of like property wherever and by whomsoever owned. The first is unlawful and invalid; the second is lawful and valid. But without such adjudications, clear and impartial reason will furnish the like distinction. In the one case, the controlling power of Federal authority must restrain the state—an integral part of the Union—from directly or indirectly inhibiting or burdening commerce between citizens of the different states, whereby like freedom of interstate commerce cannot be exercised by all, regardless of their state domicil or citzenship. But, on the contrary, the same Federal authority will refrain from interference, nor place any obstacle, where the state seeks only to compel all wealth and property within its borders—whether permanently, or practically so, by continuous use therein—to assume its share of the burdens of government for such jurisdiction.

The line of separation, the criterion or test, as to property of persons or companies transacting an interstate business or commerce, turns usually on the matter of location of property. It is oftentimes difficult to ascertain in what jurisdiction, and to what extent, any property has this location or *situs* for taxation purposes. Especially is this so of intangible property, as in the Express Company cases. But in the case at bar, where tangible property of a definite kind, quantity, and value, is habitually within the jurisdiction of one state, and *ipso facto*, not in any other jurisdiction, to deny that particular state the right of equable taxation, is an

invasion of its sovereignty and would be to make the right of free and unrestricted commerce between the states the cloak for unworthy purposes, and the means of evasion of just obligations to the state.

Respectfully submitted,

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Attorney for Defendant in Error.